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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1080 48

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

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REPLY BRIEF ON BEHALF OF PETITIONER

Messrs. J. Bernhard Thiess and Thorley von Holst, purporting to appear *pro se* and on behalf of certain oil refining companies,* have filed a brief in opposition to the petition for writ of *certiorari* under Section 240(a) of the Judicial Code (28 U. S. C. § 347) in the above entitled matter. They have requested that their brief should likewise be considered applicable and in opposition to your petitioner's motion for leave to file a petition for writ of *certiorari* under Section 262 of the Judicial Code (28 U. S. C. § 377), filed in this Court simultaneously with the petition under Section 240(a) of the Judicial Code.

*Namely, Skelly Oil Company, Globe Oil & Refining Company (of Illinois), Eldorado Refining Company, Globe Oil & Refining Company (of Kansas), Rock Island Refining Company and Anderson Prichard Oil Company.

Your petitioner respectfully submits this reply and similarly requests that it be considered applicable in both the proceeding under Section 240(a) of the Judicial Code and that under Section 262 of the Judicial Code.

While, as will more fully hereinafter appear, Messrs. Thiess and von Holst, for the first time, in the brief in opposition to the petition, assert that they appear *pro se* and on behalf of certain oil refining companies, they have heretofore always described themselves and have been referred to as "*Amici Curiae*". Accordingly, we will continue in this brief to refer to them in such manner.

POINT I.

The contention of *Amici Curiae* that the present proceeding constitutes a case or controversy within the meaning of Article III, Sections 1 and 2 of the Constitution, is without merit.

Amici Curiae, in spite of much obfuscation, in effect concede, as they must, that the existence of a case or controversy, as defined by Article III, Sections 1 and 2 of the Constitution, is a prerequisite to the entry of a binding decree by the Court of Appeals in the present investigation. *Amici Curiae*, therefore, address themselves to the inquiry as to whether or not the instant proceeding is such a case or controversy. This problem they consider in two aspects: (a) whether a court has inherent power to determine fraud in its judgments (Br. 17-23),* and (b) whether the con-

*The brief of Messrs. J. Bernhard Thiess and Thorley von Holst in opposition to the petition for writ of *certiorari* will be cited as "Br."

stitutional requirement of adverse parties was met in the present investigation (Br. 23-8).

With respect to the first aspect, your petitioner reiterates that it does not presently contend that the Court of Appeals would not have been empowered, in a legally cognizable proceeding, to confirm the Master's report, adopt his findings of fact and conclusions of law and set aside the *Root* judgments (Pet. 4-5; M. Pet. 8).* Rather, petitioner's position is that, absent a case or controversy involving adverse parties, the Court of Appeals had no jurisdiction in the instant investigation to make findings of fact or to enter orders or decrees binding upon your petitioner or affecting its property rights (Pet. 5; M. Pet. 8).

None of the authorities relied on by *Amici Curiae* in connection with this aspect of their argument meets your petitioner's contention. *Amici Curiae* rely primarily upon *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, and the companion case of *Sharkee Mfg. Co.* v. *Hartford Co.*, 322 U. S. 271.** In these cases, however, there was no question as to the adversary character of the proceeding. The very party seeking to vacate the judgment for fraud was the party against whom the judgment had been entered in

*The petition for writ of *certiorari* under Section 240(a) of the Judicial Code will be cited as "Pet. . . .". The motion for leave to file a petition for writ of *certiorari* and petition for writ of *certiorari* under Section 262 of the Judicial Code will be cited as "M. Pet. . . .".

**The other cases cited at page 16 of *Amici Curiae's* brief, in general, merely enunciate the familiar rule that a final judgment or decree cannot be examined at a subsequent term of court except in cases of fraud. They are in no way similar, factually, to the present proceeding, and do not involve the fundamental constitutional question as to the existence of a case or controversy.

the first instance. While in both the *Hazel-Atlas* case and the *Root* case the parties thereto had settled the controversy which had existed between them, in the *Hazel-Atlas* case one of the parties to the settlement subsequently repudiated the settlement and sought to vacate the judgment which had been entered against it. On the contrary, in the instant proceeding, total strangers both to the litigation and the settlement are attempting to set in motion the judicial machinery to vacate a judgment of the Court of Appeals entered, not against them, but against one of the parties to the settlement agreement.

American Ins. Co. v. *Lucas*, 38 F. Supp. 926, aff'd 8 Cir., 129 F. (2d) 143, *cert. den.* 317 U. S. 687, like the *Hazel-Atlas* case, did not involve the determination of whether a case or controversy existed, for the reason that the proceeding to set aside the fraudulently procured judgments was instituted by the legal successor to one of the parties to the original controversy.

Amici Curiae mistakenly assert that petitioner's contention of lack of jurisdiction rests wholly upon "the effect of Root's settlement and its inactivity in the fraud proceedings" (Br. 21). They argue that such settlement could not render the *Root* case moot and could not defeat the power of the court to vacate the original judgments of June 26, 1935 (Br. 21-2).

Actually, of course, the *Root* case had become moot prior to the orders here complained of, not only because of the settlement by Root and Universal of the controversy between them, but also because of the fact that both patents involved in the original litigation had expired by lapse of time.* Though the Clerk of the Court of Appeals has

*Dubbs patent No. 1,392,629 expired in 1938; Egloff patent No. 1,537,593 expired in 1942.

suggested informally that the court thought it might be appropriate to direct a dismissal of the complaints in the *Root* case on the ground of unclean hands, *Amici Curiae* themselves deemed the case moot and submitted to the Court of Appeals, on or about January 9, 1945, a form of order and mandate directing that the complaints be dismissed on the ground that the controversy had become moot. In the order of the Court of Appeals, dated June 15, 1944, it was directed that the appeals be reargued (v. IX, pp. 3661-2). This, however, was not feasible in view of the settlement between Root and Universal and particularly in view of the fact that the patents had expired.

In any event, the point is not that the settlement, of itself, is insufficient to deprive the Court of Appeals of power to vacate the original judgments (as to which there is no dispute), but rather that the Court of Appeals, in a proceeding lacking adverse parties asserting adverse interests, and which was conducted in an informal, non-judicial manner, and in a cause which had become moot, could do no more than conduct an investigation of its membership and of the officers of the court practicing before it (P. Br. 38; J. P. Br. 7),* and could not make findings of fact or conclusions of law or enter orders or decrees binding upon your petitioner or affecting its property rights.

The second aspect of the contention of *Amici Curiae* (Br. 23-8), namely, that there were present in the instant

*Your petitioner's brief in support of the petition for writ of *certiorari* under Section 240(a) of the Judicial Code is cited as "P. Br. ". The brief in support of the petition for writ of *certiorari* under Section 262 of the Judicial Code is cited as "M. P. Br. "

proceeding adverse parties, satisfying the constitutional requirement, is wholly without merit.

Amici Curiae confidently assert that the fact that they participated actively in the conduct of the present investigation is sufficient to render their clients, seven stranger corporations, parties to the *Root* case, within the constitutional meaning. This claim is broached for the first time in *Amici Curiae's* present brief. Although they stated to the Court of Appeals at the hearing which commenced the present proceedings (v. I, pp. 2-3; 9, 14) that they appeared on behalf of certain clients, it was Judge Biggs' suggestion that they proceed as *amici curiae* (v. I, pp. 14-5, 28). Their petition of June 18, 1941, while it referred to the fact that they were attorneys for certain corporate clients, was filed "as *amici curiae*" (v. I, p. 29). Moreover, the order of the Court of Appeals, dated November 26, 1941, was entered upon their petition as *amici curiae* and so describes them throughout (v. I, pp. 94-6).[3] Thereafter they consistently appeared in the proceeding as such. Their present brief represents the first instance in which they claim to appear *pro se* and on behalf of certain named clients.

The contention of *Amici Curiae* that their clients are parties* to the *Root* case is made despite the fact that the only possible interest of such clients in the *Root* case was the

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*The fallacy of the contention of *Amici Curiae* that their "clients" are parties to this proceeding is demonstrated by the obvious lack of power of the Court of Appeals to enter any binding judgment for the costs of this proceeding against these non resident corporations, who were never parties to any pending litigation, had never intervened in any such litigation and had never subjected themselves to the processes of that court.

former possibility that a judgment in favor of Universal in the *Root* case might successfully have been asserted as *res adjudicata* in suits by Universal against those clients. Indeed, when petitioner amended its complaint in the case of *Universal Oil Products Company* v. *Globe Oil & Refining Co.* to set up the *Root* judgments as *res adjudicata*, *Amici Curiae*, representing the defendant in that case, vigorously disputed the contention of petitioner that their client in that case was a party to the *Root* case and was bound by those judgments. While, in the first instance, the District Court held that the *Root* judgments were *res adjudicata* (27 F. Supp. 161), upon the settlement of the controversy existing between Universal and Root, the District Court reversed its decision and held that the judgments could not be deemed to be *res adjudicata* (31 F. Supp. 665).

Although *Amici Curiae* have, perhaps unwittingly, created the erroneous impression that there exists a present danger that their clients might be bound by the *Root* judgments (Br. 6),* the fact is that the possibility no longer exists. Not only have both patents involved in the *Root* case (Dubbs patent No. 1,392,629 and Egloff patent No. 1,537,593) expired, but all suits against their clients, based on those patents, have been discontinued with prejudice.

In support of the contention that their clients became parties to the *Root* case, *Amici Curiae* rely primarily upon

*At page 6 of their brief, *Amici Curiae* leave the impression that their client, Globe Oil & Refining Company, was held bound by the *Root* judgments on the doctrine of *res adjudicata*. Subsequently, at page 7, they reveal that following the settlement between Root and Universal in January, 1939, the United States District Court for the Northern District of Illinois held that such client was not bound.

Drummond v. *United States* (decided March 5, 1945) U. S. , 89 L. Ed., Ad. Op. 647 (cited at Br. 25).* That case merely enunciates the familiar principle that one who actively aids in the conduct of a litigation, though not a formal party, may be bound by the judgment under the doctrine of *res adjudicata*. The case obviously has no bearing upon the constitutional requirement of adverse parties asserting adverse interests.

In *Compton* v. *Jesup*, 6 Cir., 68 Fed. 263 (cited at Br. 26-7), a decree of foreclosure was entered upon the suit of certain mortgagees. Thereafter, prior mortgagees commenced a second suit in the same court. In the latter suit, diversity of citizenship did not exist, but this was held to be immaterial, as the litigation was regarded as ancillary to the original proceeding since the court had possession of the property under the former foreclosure.

Obviously, the *Compton* case is no authority for the assertion by *Amici Curiae* (Br. 27 fn.) that their seven clients would have had the right to intervene in the *Root* case. *Amici Curiae* cannot justifiably compare the status of their clients to that of a prior mortgagee in so far as the right of intervention is concerned.

Moreover, the informal, non-judicial nature of the proceeding and the disregard of the established rules of evidence demonstrate that the proceeding was regarded by the

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*Freeman v. Howe, et al., 65 U. S. 450, and *Root* v. *Woolworth*, 150 U. S. 401 (cited at Br. 25), involve merely the right of a non-party to a litigation to file a supplemental bill therein and indicate that such non-party may be an assignee of a party to the original litigation or one who claims a similar interest. In these cases there was no question of the existence, in the supplemental proceeding, of a case or controversy involving adverse parties. Moreover, the cases did not involve bills of review, as intimated by *Amici Curiae* (Br. 25), but rather supplemental or ancillary bills in equity.

Master at least, and should be regarded here, merely as an investigation and not as a case or controversy in which orders or decrees, binding upon your petitioner, might be entered (P. Br. 39-40; M. P. Br. 8-9).

Amici Curiae have erroneously assumed that your petitioner's argument, addressed to the informality of the proceeding and the disregard of the rules of evidence, was no more than an attempt to secure a review of specific errors in the admission or exclusion of evidence (Br. 31).

Thus, *Amici Curiae* complain (Br. 32) that no specific instances of erroneous rulings upon the evidence have been referred to by your petitioner and that it is therefore impossible for them to show the absence of error. In fact, however, your petitioner has fully discussed and cited the particular actions of the Court of Appeals and of the Master which deviated from the normal and usual procedures followed in a case or controversy under the Constitution. (See, for example, Pet. 14, 16-7, 19-21; P. Br. 39-40; M. Pet. 17, 19-21, 23-5; M. P. Br. 8-9.) Indeed, the departures from the recognized judicial procedure are of much greater significance than *Amici Curiae* admit. These departures are more than mere errors of law; they are indicative of the very nature of the investigation which the Master believed he was conducting. Throughout the investigation, counsel for petitioner pointed out to the Master that, while testimony which he was receiving might be proper in an investigation into the probity of the court, it would be highly improper and inadmissible in so far as the investigation might be deemed to be a judicial proceeding in which findings of fact might be entered, binding upon petitioner and affecting its property rights (Pet. 20; M. Pet. 24).

Finally, *Amici Curiae* assert (Br. 32) that it is apparent from the Master's report that, apart from the procedures of which petitioner complains, the fraud was fully established by competent evidence. However, as this Court indicated in the *Hazel-Atlas* case itself, it is doubtless "wholly impossible accurately to appraise the influence" which improper evidence may have upon the judicial mind (322 U. S. 238, 247).

Summarizing, it is apparent, and understandably so, that *Amici Curiae* have completely failed to establish the existence of a case or controversy in the constitutional sense. Under such circumstances, the Court of Appeals was clearly without jurisdiction to make any findings of fact or conclusions of law or to enter any orders or decrees binding upon your petitioner or affecting its property rights.

POINT II.

The contention of *Amici Curiae* that the Court of Appeals properly taxed fees and expenses against your petitioner is without merit.

If the Court of Appeals was without jurisdiction to hear and determine the present matter on the merits, it is clear, and *Amici Curiae* would undoubtedly concede, that it lacks jurisdiction to direct payment by your petitioner of the compensation and expenses of *Amici Curiae*. (See P. Br. 41-2; M. P. Br. 10-1.)

Even if it be assumed, *arguendo*, that the Court of Appeals had jurisdiction in the instant proceeding, nevertheless *Amici Curiae* are not entitled to counsel fees and expenses. (See P. Br. 42-3; M. P. Br. 11-2.) The cases cited by *Amici Curiae* (Br. 28) are not to the contrary. Thus,

Ex parte Peterson, 253 U. S. 300, involved merely the allowance of costs to an auditor who, under the circumstances, was no more than an instrument of the court appointed for the purpose of simplifying the issues for the jury.*

The reliance of *Amici Curiae* on the *Peterson* case clearly demonstrates the inconsistency of their position, for their primary contention appears to be that they or their clients were parties to the proceeding for the purpose of creating a case or controversy, whereas their secondary position, namely, that they are entitled to compensation under the doctrine of the *Peterson* case, is based upon a contention that they were an instrumentality of the court and not an adverse party.

In re St. Louis Inst. of Christian Science, 27 Mo. App. 633, is readily distinguishable from the instant proceeding on two grounds: (1) the *amicus* in that case, unlike the present *Amici Curiae*, was a mere instrumentality of the court and his appointment was analogous to that of a master to take testimony, and (2) the small allowance which the petitioner in that case was required to pay the *amicus* was justifiable purely on the ground that the petitioner's initiation of the proceeding made the hire of the *amicus* necessary. The instant investigation, on the other hand, was initiated, not by your petitioner, but by *Amici Curiae* themselves.

In re Utilities Power & Light Corporation, 7 Cir., 90 F. (2d) 798, involved the power of a District Court sitting in bankruptcy to appoint an investigator. By way of dicta, the court stated that its power to appoint the investigator was of the same species as that by which the court, of its own motion, appoints an *amicus curiae*. The case has nothing whatever to do with the taxation of costs.

R. F. C. v. Menihan Corp., 312 U. S. 81, is cited by *Amici Curiae* (Br. 29-30) as recognizing the power of courts of equity to make additional allowances in cases where no fund was involved. *Amici Curiae* have misconstrued the decision. In fact, the sole issue on appeal was whether the Reconstruction Finance Corporation was clothed with immunity from the burden of costs under Rule 54(d) of the Rules of Civil Procedure. This Court held that it was not and that Rule 54(d) did not divest the District Court of its discretion to grant costs and additional allowances if the facts presented a proper case. No opinion was expressed as to whether a proper case existed for the exercise of such discretion. *Amici Curiae* failed to state that upon a subsequent application for normal costs and an extra allowance, the District Court, after noting that this Court had not expressed an opinion as to how the District Court's discretion should be exercised, determined that the case did not call for the exercise of its discretion in favor of a grant of extra allowances. *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 42 F. Supp. 244 (W. D. N. Y.).

It remains clear, therefore, even on the assumption that the Court of Appeals had jurisdiction in the present matter, that both reason and authority prohibit the direction by the Court of Appeals of payment by your petitioner of $154,606.57 as compensation to and expenses of *Amici Curiae* (P. Br. 41-3; M. P. Br. 10-2).

CONCLUSION.

The petition for writ of *certiorari* should be allowed and the Order of December 29, 1944, purported to have been entered by the Circuit Court of Appeals for the Third Circuit in the instant proceeding should be reviewed and reversed.

Respectfully submitted,

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April 20, 1945.